



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

NIKWIGIZE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Cristiano Papile, ALS/OHRM
Susan Maddox, ALS/OHRM

Introduction

1. On 12 March 2016, the Applicant, a former Senior Programme Officer at the P-5 level in the United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (“OHRLLS”), filed an application contesting the decision to impose on him the disciplinary measure of dismissal, effective 30 November 2015. He requests the following remedies:

- (a) Review of the disciplinary measure and discuss the content of the [Office of Internal Oversight Services, “OIOS”] report under the mediation of the Office of the Ombudsman and Mediation Services, or even by an independent mediation service [;]
- (b) Order the Administration to pay appropriate compensation for the loss of employment. [His] initial contract was due to expire on 31 March 2019;
- (c) Order the Administration to pay compensation for loss of physical integrity due to discrimination, exclusion, threats and coercion, reflected in several days of depressive illness, visits to physicians in Brussels and New York;
- (d) Undertake a comprehensive and independent review of allegations on racial discrimination, exclusion and abuse of authority, including a review of the selection system.

2. In his reply on receivability, the Respondent claims that the application is not receivable *ratione temporis*. In essence, the Respondent submits that the Applicant is challenging a dismissal decision which is a disciplinary measure that is not subject to a management evaluation, that the contested decision was communicated to the Applicant on 30 November 2015 for which reason the application ought to have been filed the application within 90 days of 30 November 2015, notably by 29 February 2016, and that the Applicant filed the application on 14 March 2016 and therefore two weeks after the expiry of the statutory time limit.

Facts and procedural history

3. By memorandum dated 25 August 2015, it was alleged that the Applicant had engaged in misconduct by submitting to the Organization in or about 2011 and 2012, one or more education grant claims and/or related documentation that contained false, misleading, inaccurate and/or incorrect information, signatures and/or stamps.

4. By memorandum dated 25 September 2015, the Applicant submitted his comments on the allegations of misconduct stating, *inter alia*, that:

... The OIOS report has assessed thoroughly the various submissions for education grant claims. [The Applicant] accepts that the P-41 Form submitted for [JN] for 2010-2011 was false as well as the one submitted for [K and K] for the first term 2011-2012...“.

... The Applicant sincerely apologize for these two false submissions. [He] accept the responsibility on the account of oversight and/or negligence.

5. On 30 November 2015, the Applicant received a letter from the Officer-in-Charge of the Office of Human Resource Management dated 27 November 2015, stating that the Under-Secretary-General for Management had decided to impose on him the disciplinary measure of dismissal in accordance with Staff Rule 10.2(a)(ix).

6. On Saturday, 12 March 2016, the Applicant filed the application to the Dispute Tribunal contesting his dismissal from service.

7. On 14 March 2016, the Registry transmitted the application to the Respondent, who was notified that the deadline for filing his reply was at 5:00 p.m. on 13 April 2016.

8. On the same day, the Respondent filed a motion for leave to file a reply limited to the issue of the receivability of the application.

9. By Order No. 77 (NY/2016) dated 22 March 2016, the Tribunal (Judge Ebrahim-Carstens) granted the Respondent leave to file a reply limited to the

issue of the receivability of the application by 28 March 2016. The Applicant was ordered to file his comments on the reply by 11 April 2016.

10. On 22 March 2016, the Respondent filed his reply on the issue of the receivability of the application, submitting that the application is not receivable because it was not filed within 90 days of the Applicant's receipt of the administrative decision as required by art. 8.1(d)(ii) of the Dispute Tribunal's Statute.

11. On 8 April 2016, the Applicant filed his comments on the Respondent's reply on the issue of the receivability of the application in which he requested that the Tribunal waive the statutory deadline for filing an application.

12. On 9 May 2016, the case was assigned to the undersigned Judge.

13. By Order No. 124 (NY/2016) dated 3 June 2016, the Tribunal ordered the Applicant to file any relevant documentation in support of his motion for waiver of the statutory deadline for filing the application regarding the details and circumstances of his repatriation following separation for service. The Respondent was ordered to file a response to the Applicant's motion, together with any relevant documentation.

14. On 10 June 2016, the Applicant filed his response to Order No. 124 (NY/2016), in which he stated, amongst others, that:

... During months of December 2015 and January 2016 [he] spent time exchanging emails with [the Office of Human Resources Management] on the relocation process. Initially, [he] was expected to be relocated to Burundi, [his] home country, but due to current problems of security and conflicts in that country, [he] requested to be relocated to South Africa. The request was approved on 5 January 2016.

[...]

... After all the extensive exchange of emails [the Applicant attached this email exchange to his submission], [he] was able to travel

to Johannesburg on 3 February 2016 and arrived the following day.
[...]

... It took [him] more than one month to settle in Johannesburg and be connected to internet. Immediately, [he] started preparing the Application that [he] submitted to UNDT on 12 March 2016.

... For all these reasons, [he] maintain[s] [his] appeal to accept [his] request to waive the 90 days' requirement.

15. On 13 June 2016, as per Order No. 124 (NY/2016), the Respondent filed his response in which he contended that for no “persuasive reasons”, the application was filed “patently out of time” and that his alleged late filing should be deemed time-barred.

16. By Order No. 150 (NY/2106) dated 23 June 2016, the Tribunal ordered the parties to file any closing submissions on the issue of receivability by 22 July 2016. On 18 July 2016, the Respondent filed his closing statement. The Applicant did not file a closing statement.

Respondent's submissions on receivability

17. The Respondent's principal contentions may be summarized as follows:

a. Staff Rule 11.2(b) provides that “[a] staff member wishing to formally contest [...] a decision taken at Headquarters in New York to impose a disciplinary [...] measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation”;

b. Article 8.1(d)(ii) of the Statute of the Dispute Tribunal provides that, in cases where a management evaluation of the contested decision is not required, an application shall be receivable if it is filed “within 90 calendar days of the applicant's receipt of the administrative decision”. Similarly, art. 7.1(c) of the Tribunal's Rules of Procedure states that applications shall be filed within “90 calendar days of the receipt by the applicant of the

administrative decision in cases where a management evaluation of the contested decision is not required”;

c. Article 7.5 of the Tribunal’s Rules of Procedure states that, “[i]n exceptional cases, an applicant may submit a written request to the Dispute Tribunal seeking suspension, waiver or extension of the time limits referred to in article 7.1 above”;

d. The Appeals Tribunal has consistently held that time limits are to be strictly enforced. The Appeals Tribunal has also held that a request for an extension of the time limits must be submitted prior to the expiry of the statutory deadline. Finally, the Appeals Tribunal has held that only circumstances beyond an applicant’s control that prevented him or her from exercising the right of appeal in a timely manner may be considered exceptional circumstances justifying a waiver of the statutory time limits;

e. The Applicant challenges a disciplinary measure imposed on him following a disciplinary process. As such, it was not subject to management evaluation;

f. By the Applicant’s own admission, the dismissal decision was communicated to him on 30 November 2015. In accordance with the provisions cited above, the application ought to have been filed within 90 days of 30 November 2015, i.e., by 29 February 2016. The Applicant filed the application on 14 March 2016, two weeks after the expiry of the statutory time limit;

g. The Applicant did not request an extension of the statutory time limits prior to the expiry thereof, nor has the Applicant demonstrated that there were circumstances beyond his control that prevented him from exercising his right of appeal in a timely manner. To the contrary, the Applicant actively

participated in a different case before the Tribunal (Case No. UNDT/NY/2015/025), including by filing a closing submission on 22 January 2016. The fact that the Applicant was able to file a submission to the Tribunal (albeit in a different case) during the filing window for contesting his dismissal would appear to preclude an argument that it was impossible for him to comply with the time limits in the instant case.

Applicant's submissions on receivability

18. The Applicant's principal contentions may be summarized as follows:
 - a. On 3 June 2015, the Applicant filed a complaint to the Assistant-Secretary-General for Human Resources Management ("ASG/OHRM") requesting a review and an investigation for racial discrimination incidents in the OHRLLS since 2012. Only 6 months later, on 18 December 2015, the Applicant received a response from the ASG/OHRM which, according to the Applicant, did not address the key issues raised in the complaint. On 16 February 2016, the Applicant submitted the same complaint to the Management Evaluation Unit for review and investigation. The Applicant received a response on 8 March 2016 in which the decision of the ASG/OHRM not to investigate on the matter was confirmed;
 - b. The Applicant's dismissal did not abide to Staff Rules on the dismissal of a staff member as not all processes leading to formal dismissal, including discussions on the OIOS findings, informal resolution of the incidents, including through mediation, further review of the disciplinary action by the Management Evaluation Unit, and possibly, request the assistance of the "Staff Association", had been exhausted;
 - c. In the context of staff rule 11.2(b), the Respondent misinterpreted the concept of a staff member not being required to request a management

evaluation, which means that the staff member against whom a disciplinary action is taken is not obliged to abide by the procedures of management evaluation or informal resolution. However, it does not mean he is not entitled to resort to those mechanisms of dispute settlement. In the present case, the Administration did not leave any other choice but to appeal to the Dispute Tribunal and all mediation doors were closed. The dismissal decision was in effect the same day it was issued, leaving no room for negotiation and informal resolution;

d. The Applicant's repatriation and settlement procedures took longer than scheduled. Initially, he was expected to be repatriated to his home country, Burundi, but he had to temporarily settle in South Africa until the security situation in Burundi was stabilised. The Applicant's settlement in South Africa was not easy and access to information and communication technology was only possible on 11 March 2016.

Consideration

Applicable law

19. Article 8 of the Statute of the Dispute Tribunal states (emphasis added):

Article 8

1. An application shall be receivable if:

(a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;

(b) An applicant is eligible to file an application, pursuant to article 3 of the present statute;

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices;

(ii) *In cases where a management evaluation of the contested decision is not required, within 90 calendar days of the applicant's receipt of the administrative decision:*

...

3. The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.

4. Notwithstanding paragraph 3 of the present article, an application shall not be receivable if it is filed more than three years after the applicant's receipt of the contested administrative decision.

20. Article 7 of the Tribunal's Rules of Procedure states:

Article 7 Time limits for filing applications

1. Applications shall be submitted to the Dispute Tribunal through the Registrar within:

(a) 90 calendar days of the receipt by the applicant of the management evaluation, as appropriate;

(b) 90 calendar days of the relevant deadline for the communication of a response to a management evaluation, namely, 30 calendar days for disputes arising at Headquarters and 45 calendar days for disputes arising at other offices; or

(c) 90 calendar days of the receipt by the applicant of the administrative decision in cases where a management evaluation of the contested decision is not required.

...

5. In exceptional cases, an applicant may submit a written request to the Dispute Tribunal seeking suspension, waiver or extension of the time limits referred to in article 7.1 above. Such request shall succinctly set out the exceptional circumstances that, in the view of the applicant, justify the request. The request shall not exceed two pages in length.

21. Staff rule 10.2(b) states:

Rule 10.2

Disciplinary measures

...

(b) Measures other than those listed under staff rule 10.2 (a) shall not be considered to be disciplinary measures within the meaning of the present rule. These include, but are not limited to, the following administrative measures:

(i) Written or oral reprimand;

(ii) Recovery of monies owed to the Organization;

(iii) Administrative leave with full or partial pay or without pay pursuant to staff rule 10.4.

...

22. Staff rule 10.3(c) states:

Rule 10.3

Due process in the disciplinary process

...

(c) A staff member against whom disciplinary or non-disciplinary measures, pursuant to staff rule 10.2, have been imposed following the completion of a disciplinary process may submit an application challenging the imposition of such measures directly to the United Nations Dispute Tribunal, in accordance with chapter XI of the Staff Rules.

...

23. Staff rule 11.2 states:

Rule 11.2

Management evaluation

...

(b) A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation.

...

24. Staff rule 11.4(a) states:

Rule 11.4

United Nations Dispute Tribunal

(a) A staff member may file an application against a contested administrative decision, whether or not it has been amended by any management evaluation, with the United Nations Dispute Tribunal within 90 calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the deadline specified under staff rule 11.2(d), whichever is earlier.

25. ST/AI/371 (Revised disciplinary measures and procedures) as amended by ST/AI/371 Amend. 1, paras. 9(a) and (b) and 10, provide that:

II. Investigation and fact-finding

9. Upon consideration of the entire dossier, the Assistant Secretary-General, Office of Human Resources Management, on behalf of the Secretary-General shall proceed as follows:

(a) Decide that the disciplinary case should be closed, and immediately inform the staff member that the charges have been

dropped and that no disciplinary action will be taken. The Assistant Secretary-General may, however, decide to impose one or more of the non-disciplinary measures indicated in staff rule 10.2 (b)(i) and (ii), where appropriate; or

(b) Should the preponderance of the evidence indicate that misconduct has occurred, recommend the imposition of one or more disciplinary measures.

Decisions on recommendations for the imposition of disciplinary measures shall be taken by the Under-Secretary-General for Management on behalf of the Secretary-General. The Office of Legal Affairs shall review recommendations for dismissal of staff under staff rule 10.2 (a)(ix). Staff members shall be notified of a decision to impose a disciplinary measure by the Assistant Secretary-General for Human Resources Management.

III. Application to the United Nations Dispute Tribunal

10. A staff member against whom a disciplinary or a non-disciplinary measure has been imposed following the conclusion of the disciplinary process is not required to request a management evaluation, and may submit an application to the United Nations Dispute Tribunal in accordance with chapter XI of the Staff Rules. The submission of an application to the United Nations Dispute Tribunal contesting a disciplinary or non-disciplinary measure imposed following the conclusion of the disciplinary process shall be made within 90 calendar days of receiving notification of the decision. The filing of such an application shall not have the effect of suspending the measure.

Receivability framework

26. As established by the United Nations Appeals Tribunal, the Dispute Tribunal is competent to review *ex officio* its own competence or jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis* (*Pellet* 2010-UNAT-073, *O'Neill* 2011-UNAT-182, *Gehr* 2013-UNAT-313 and *Christensen* 2013-UNAT-335). This competence can be exercised even if the parties do not raise the issue, because it constitutes a matter of law and the Statute of the Dispute Tribunal prevents it from considering cases that are not receivable.

27. The Dispute Tribunal’s Statute and the Rules of Procedure clearly distinguish between the receivability requirements as follows:

a. The application is receivable *ratione personae* if it is filed by a current or a former staff member of the United Nations, including the United Nations Secretariat or separately administered funds (arts. 3.1(a)–(b) and 8.1(b) of the Statute) or by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered funds and programmes (arts. 3.1(c) and 8.1(b) of the Statute);

b. The application is receivable *ratione materiae* if the applicant is contesting “an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment” (art. 2.1 of the Statute) and if the applicant previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute);

c. The application is receivable *ratione temporis* if it was filed before the Tribunal within the deadlines established in art. 8.1(d)(i)–(iv) of the Statute and arts. 7.1–7.3 of the Rules of Procedure.

28. It results that in order to be considered receivable by the Tribunal, an application must fulfil all the mandatory and cumulative requirements mentioned above.

Receivability ratione personae and ratione materiae

29. The Tribunal notes that the Applicant is a former Senior Programme Officer at the P-5 level in the OHRLLS and therefore the application is receivable *ratione personae*.

30. The Applicant is challenging the decision to dismiss him from service which according to staff rules 9.6 and 10.2(a)(ix) is a disciplinary measure. Furthermore, according to staff rule 10.3(c), a staff member against whom disciplinary or non-disciplinary measures pursuant to art. 10.2 have been imposed following the completion of a disciplinary process may submit an application challenging the imposition of such measures directly to the Dispute Tribunal and a management evaluation request is not required. In conclusion, the application is receivable *ratione materiae*.

Receivability ratione temporis

31. Pursuant to mandatory provisions of art. 8.1(d) of the Dispute Tribunal's Statute ("shall"), for an application to be receivable it must be filed within the applicable deadlines, which in cases such as the present one (see staff rule 11.4) where a management evaluation of the contested decision is not required, is "90 calendar days [as] of the applicant's receipt of the administrative decision".

32. The Tribunal notes that the contested decision in the present case is the Applicant's dismissal and that it is uncontested that the disciplinary decision challenged by the Applicant was communicated to him on 30 November 2015. Therefore, pursuant to art. 8.1(d)(ii) of the Dispute Tribunal's Statute, an appeal against this decision was to be filed within 90 days from the date of communication, notably by 29 February 2016. It results that the application submitted on 12 March 2016 was filed after the mandatory time limit had expired.

33. The Tribunal further notes that no motion for waiving and or suspending the deadline to file the application was filed before the expiration of the deadline or as part of the belated application. The Applicant only submitted a request to waive the deadline for challenging the dismissal on 8 April 2016 and only after the Respondent had invoked that the application was time-barred and not receivable *ratione temporis*, as part of his comments to the receivability issue. It results that the motion was not

only filed after the expiration of the statutory time limit to file an application 29 February 2016, but was filed almost a month after the filing of the application on the merits.

34. In *Thiam* 2011-UNAT-144, para 18, which is applicable *mutatis mutandis* to the present case, the Appeals Tribunal decided that:

This Court can exercise its discretion under Article 7 of the [Appeals Tribunal's] Statute upon written application for suspension, waiver, or extension of time limit by an appellant *prior* to the filing of an appeal.

35. Moreover, after reviewing the reasons provided by the Applicant, the Tribunal considers that they do not represent exceptional circumstances to justify the delay in filing the application for the following reasons:

a. An appeal against a disciplinary decision can be filed directly before the Dispute Tribunal any time after receiving the notification of the decision and until the expiration of the mandatory deadline of 90 days from the day of notification. The disciplinary decision of dismissal was communicated to him on 30 November 2015, and none of the subsequent correspondence and/or other filings before the MEU or OHRM in anyway modified this decision and thereby gave rise to a new decision. The management evaluation request filed on 15 February 2016, which the Applicant appended to his application, did not concern the dismissal decision notified to him on 30 November 2015;

b. The correspondence from 2 December 2015 through 1 February 2016 clearly indicates that the Applicant was informed about the repatriation travel, including the personal deviation via Johannesburg expressly requested by him;

c. The Applicant arrived in Johannesburg on 3 February 2016 and there is no evidence that between 4 February 2016 and the expiration of the deadline to file the application before Dispute Tribunal on 29 February 2016,

any exceptional circumstances beyond his control prevented him from filing a motion to request a waiver/suspension of the deadline to file the application on the merits and/or the appeal against the dismissal. Moreover, there is no evidence to support the Applicant's allegations that "the settlement in South Africa was not easy and the access to information and technology was only possible on 11 March 2016". Furthermore, Practice Direction No. 5 of the Dispute Tribunal, sec. 11, allows parties, if electronic means are not available, to file submissions by post (or by hand, if relevant). The Applicant provided no evidence that he was impeded from forwarding the motion and/or application by post.

36. The Tribunal concludes that the motion to waive the deadline for filing the application was to be filed on or before 29 February 2016, notably the expiration of the deadline, and there were no exceptional circumstances to justify the delay in filing both the motion and the application. The 90-day time limit for staff members or former staff members to submit an application after the notification of a disciplinary measure is sufficiently long to allow them to address any factual and/or legal issues. (see *Czaran* UNDT/2012/133, upheld by the Appeals Tribunal in *Czaran* 2013-UNAT-373). Furthermore, even if the Applicant absolutely required more than 90 days to submitting his application, he could and should have diligently applied for an extension of time to file the application either before his departure from New York or before the expiration of the deadline.

37. The Tribunal underlines that the Appeals Tribunal have consistently stressed in its binding jurisprudence that time limits for formal contestation are to be strictly enforced (see, for instance, *Mezoui* 2010-UNAT-043, *Al-Mulla* 2013-UNAT-394, *Samuel Thambiah* 2013-UNAT-385, *Romman* 2013-UNAT-308, *Kissila* 2014-UNAT-470 and *Kazazi* 2015-UNAT-557).

38. Consequently, in the light of the above, the Tribunal dismisses the motion to waive the deadline for filing the application and finds that the application was filed outside the applicable 90-day time limit as provided for by art. 8.1(d)(ii) of the Statute.

Conclusion

39. In the light of the foregoing the Tribunal DECIDES:

- a. The Applicant's motion to waive the deadline for filing the application is rejected; and
- b. The application is rejected as non-receivable.

(Signed)

Judge Alessandra Greceanu

Dated this 16th day of August 2016

Entered in the Register on this 16th day of August 2016

(Signed)

Hafida Lahiouel, Registrar, New York